

Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

LAURA L. BOWKER

Lafayette, Indiana

ATTORNEY FOR APPELLEE:

CHARLES R. DEIBLE

Gambs Mucker & Bauman

Lafayette, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF THE ADOPTION OF C.C.,)

J.M. and A.M.)

MICHAEL HAYES,)

Appellant,)

vs.)

TIPPECANOE COUNTY DEPARTMENT)

OF CHILD SERVICES,)

Appellee.)

No. 79A02-0603-CV-264

APPEAL FROM THE TIPPECANOE CIRCUIT COURT

The Honorable Donald Daniel, Judge

Cause No. 79C01-0411-AD-75

August 25, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Michael Hayes appeals the trial court's denial of his petition to adopt C.C., J.M., and A.M. (collectively "Children"). Hayes raises two issues, which we consolidate and restate as whether the trial court erred by denying Hayes's petition to adopt the Children. We affirm.

The relevant facts follow. Hayes met eighteen-year-old Amanda McMahon in 1998 at a hotel when McMahon was homeless. Hayes invited McMahon to live with him and adopted McMahon in 2000. McMahon is the biological mother of C.C., born August 12, 1996, A.M., born September 5, 2000, and J.M., born June 1, 2002. McMahon and the Children eventually moved into an apartment, but on July 14, 2003, the Tippecanoe County Department of Child Services ("TCDCS") removed the Children from McMahon's care due to neglect. The Children were found to be children in need of services ("CHINS"), and Hayes's petition to intervene in the CHINS case and petition for grandparent visitation were denied. On November 19, 2004, McMahon's parental rights to the Children were involuntarily terminated, and the TCDCS became the guardian of the Children.

Hayes filed a petition to adopt the Children, but the TCDCS did not consent to Hayes's adoption of the Children. Rather, the TCDCS consented to the adoption of the Children by their foster parents. The Carroll County Department of Child Services completed an adoption study that was submitted to the trial court pursuant to Ind. Code §

31-19-8-5.¹ The adoption study noted that Hayes pleaded guilty to one count of promoting prostitution as a class C felony and one count of attempted promoting prostitution as a class C felony in 1985. The study noted that four references were returned regarding Hayes, but “[n]one of these references offered much information and only one felt that they could recommend placing the children with [Hayes]. The others felt that they couldn’t answer that question and their responses to the other questions were often ‘unable to answer.’” Appellee’s Appendix at 94. The Carroll County Department of Child Services noted that Hayes appeared to have the finances and support to raise the Children, but it could not make a recommendation to approve the adoption because it had no information regarding the Children and their feelings about Hayes. After a hearing, the trial court denied Hayes’s petition to adopt the Children. Hayes filed a motion to correct error, which the trial court also denied.

The issue on appeal is whether the trial court erred by denying Hayes’s petition to adopt the Children. Hayes argues that strong public policy concerns mandate that

¹ Ind. Code § 31-19-8-5 provides:

- (a) Not more than sixty (60) days from the date of reference of a petition for adoption to each appropriate agency, each agency shall submit to the court a written report of and the agency’s investigation recommendation as to the advisability of the adoption.
- (b) The agency’s report and recommendation:
 - (1) shall be filed with the adoption proceedings; and
 - (2) become a part of the proceedings.

grandparents be given preference in adopting children² and that, as a grandparent, he has a liberty interest in his continued relationship with the Children.

We begin by noting that because McMahon's parental rights were terminated before the commencement of the adoption proceedings, any of Hayes's derivative due process rights with respect to visitation, custody, or adoption were effectively extinguished by the time he filed his petition. In re I.K.E.W., 724 N.E.2d 245, 249 n.6 (Ind. Ct. App. 2000). Moreover, it is well settled that "[r]elatives have no preferential legal right to adopt" in Indiana. Id. (quoting In re Adoption of Childers, 441 N.E.2d 976, 980 (Ind. Ct. App. 1982)). Indiana courts have repeatedly recognized that "grandparents do not possess a cognizable liberty interest in visitation with their grandchildren." Kennedy v. Kennedy, 688 N.E.2d 1264, 1268 (Ind. Ct. App. 1997), trans. denied. Consequently, we cannot agree with Hayes's assertion that he has a liberty interest in adopting the Children. See, e.g., I.K.E.W., 724 N.E.2d at 249 n.6 (holding that the grandparents "failed to demonstrate that they ever possessed a protected interest in the adoption of [the child]; their petition expresse[d] nothing more than a strong desire to adopt, which cannot be equated with a due process liberty interest").

Under Indiana law, Hayes's petition to adopt the Children could be "granted only if written consent to adoption [was] executed by . . . (3) Each person, agency, or county

² In support of this argument, Hayes cites the Grandparent Visitation Act, Ind. Code §§ 31-17-5, and Ind. Code § 31-34-4-2 and Ind. Code § 31-34-6-2, which concern the placement of a child in need of services. None of these statutes are applicable or relevant to adoption proceedings.

office of family and children having lawful custody of the child whose adoption is being sought.” Ind. Code § 31-19-9-1(a). It is undisputed that Hayes did not have the consent of TCDCS to adopt the Children. However, under Ind. Code § 31-19-9-8(a)(10), “[c]onsent to adoption, which may be required under section 1 of this chapter, is not required from . . . (10) A legal guardian or lawful custodian of the person to be adopted who has failed to consent to the adoption for reasons found by the court not to be in the best interests of the child.” See, e.g., In re A.D., 737 N.E.2d 1214, 1217 n.4 (Ind. Ct. App. 2000) (noting that the petition for adoption could be granted over the Marion County Office of Family and Children’s refusal to consent if it was shown that MCOFC was not acting in the child’s best interest in withholding consent).

Because the TCDCS did not consent to the adoption, Ind. Code § 31-19-10-1.2(d) is also applicable and provides: “If a petition for adoption alleges that a legal guardian or lawful custodian’s consent to adoption is unnecessary under IC 31-19-9-8(a)(10) and the legal guardian or lawful custodian files a motion to contest the adoption under section 1 of this chapter, the legal guardian or lawful custodian has the burden of proving that the withholding of the consent to adoption is in the best interests of the person sought to be adopted.” Additionally, “[t]he party bearing the burden of proof” in such a proceeding “must prove the party’s case by clear and convincing evidence.” Ind. Code § 31-19-10-0.5. Consequently, the TCDCS was required to prove by clear and convincing evidence that the withholding of its consent was in the Children’s best interest. In reviewing a judgment requiring proof by clear and convincing evidence, we may not impose our own

view as to whether the evidence is clear and convincing but must determine, by considering only the probative evidence and reasonable inferences supporting the judgment and without weighing evidence or assessing witness credibility, whether a reasonable trier of fact could conclude that the judgment was established by clear and convincing evidence. In re B.H., 770 N.E.2d 283, 288 (Ind. 2002), reh'g denied.

Hayes presented evidence that he has been involved in the Children's lives, that he is employed, that he has a suitable home, and that he loves the Children. However, evidence was also presented at the hearing that Hayes has a 1985 conviction for promoting prostitution as a class C felony and attempted promoting prostitution as a class C felony.³ Hayes met eighteen-year-old Amanda McMahon in 1998 at a hotel when McMahon was homeless. Hayes invited McMahon to live with him and adopted her in 2000. Hayes was involved with McMahon and the Children on a daily basis at the time the Children were removed from McMahon's care due to neglect. Moreover, the Carroll County Division of Child Services performed an adoption study for Hayes but could not recommend the adoption. In light of these facts, the trial court did not err when it determined that the TCDCS was acting in the Children's best interest by refusing to

³ The TCDCS also argues that there is a history of domestic violence between McMahon and Hayes, that Hayes "did not make good choices for the mother or the children" during the termination proceedings, that Hayes was an "enabler" for McMahon, and that Hayes sabotaged McMahon's efforts to make good changes and choices. Appellee's Brief at 3-4. In support of these assertions, the TCDCS cites to its written response to Hayes's petition to adopt the Children. However, no evidence was presented during the hearing in support of these assertions. We remind counsel that we cannot consider evidence not in the record and its inclusion in appellate briefs is inappropriate. Consequently, we do not consider these assertions by the TCDCS in this appeal.

consent to Hayes's adoption. See, e.g., In re L.C., 650 N.E.2d 726, 731 (Ind. Ct. App. 1995) (holding that the agency with guardianship of the child did not unreasonably withhold its consent to the adoption), reh'g denied, trans. denied, cert. denied, 517 U.S. 1136, 116 S. Ct. 1423 (1996)). Thus, the trial court did not err by denying Hayes's petition to adopt the Children.

For the foregoing reasons, we affirm the trial court's denial of Hayes's petition to adopt the Children.

Affirmed.

KIRSCH, C.J. and MATHIAS, J. concur